ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Interconnection and Resale Obligations	)	
Pertaining to	)	CC Docket No. 94-54
Commercial Mobile Radio Services	)	

COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

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SUMMARY

Comcast Cellular Communications, Inc. ("Comcast") urges the Commission to design LEC-to-CMRS interconnection requirements to promote competition between and among wireless and landline services. The Commission should adopt a zero-based, "sender keep all" model for LEC-to-CMRS interconnection. Under a "sender-keep-all" approach, carriers would not charge each other for terminating one another's traffic. By requiring LECs and CMRS providers to terminate each other's traffic without charge, a "sender keep all" interconnection model would give both LECs and CMRS providers an incentive to become more efficient to reduce costs and to maximize their outgoing traffic relative to their incoming traffic.

The relevant product market for CMRS-to-CMRS interconnection is the landline and wireless local exchanges. The relevant geographic market for CMRS-to-CMRS interconnection should be based on a CMRS provider's local service area. Since CMRS providers lack market power in both the landline and wireless local exchange, the Commission should adopt its tentative conclusion that no general interstate interconnection obligation should be imposed upon CMRS providers.

The Commission should also recognize that, absent a hearing and public interest determination under Section 201(a) ordering physical interconnection, a common carrier is allowed to exercise its business judgment to decide whether to accept or refuse an interconnection request. Legislative history, Commission and court precedent governing Section 201(a) support application of the business judgment rule. The Commission should accept this result knowing that carriers without market power have no incentive to avoid

efficient interconnection. Once CMRS intercarrier traffic levels rise, direct interconnection will also rise. Allowing CMRS providers to negotiate interconnection arrangements with other CMRS providers based on their business judgment will facilitate establishing a nationwide seamless, wireless network.

Without concluding a hearing and public interest determination under Section 201(a), the Commission cannot enforce formal complaints under Section 208. In the past, the Commission has conducted and concluded a rulemaking to impose a general interconnection obligation prior to entertaining any complaints. To enforce formal complaints against CMRS providers for alleged interconnection violations is both arbitrary and capricious where there is no existing interconnection policy or rule.

Roaming capability is an increasingly important feature of mobile telephony and the development of a "network of networks." The Commission should monitor whether roaming rates of a LEC or other entity with cellular affiliates in multiple markets are discriminatory and the product of leveraging market power in one market to charge unreasonably high rates to non-wireline roamers or unreasonably low rates to affiliate roamers. Appropriate network interface standards will facilitate roaming and help to advance the establishment of seamless nationwide networks.

To advance regulatory symmetry, the Commission should extend resale requirements applicable to cellular licensees to all CMRS providers. To the extent that CMRS providers other than cellular licensees also provide. or will provide, services that are part of the "network of networks," applying a resale obligation to them will produce competitive benefits similar to those that have resulted in the cellular industry.

Consistent with the Commission's tentative conclusion in the Notice, the Commission should reject the "switch-based resale" proposal. The "switch-based resale" proposal would force existing CMRS licensees to surrender the significant investment and equity in their systems to a fully-operational competitor just because it calls itself a "reseller." "Resale" is not an accurate term to describe the business of switch-based "resellers."

The Commission must not allow "switch-based resellers" to abuse its complaint processes to attempt to extort interconnection from cellular licensees where the issues raised in the complaints are more appropriately addressed and otherwise identical to the issues raised in this rulemaking. The *Notice* inappropriately singles out Comcast and another cellular licensee to be subject to meritless complaints filed by "switch-based resellers." The Commission should appropriately address the issues raised in those complaints in the context of this rulemaking

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COMMENTS OF COMCAST CELLULAR COMMUNICATIONS, INC.

Comcast Cellular Communications, Inc. ("Comcast"), by its attorneys, hereby files its comments in response to the Commission's Second Notice of Proposed Rulemaking in the above-captioned proceeding to address matters relating to interconnection of commercial mobile radio service (CMRS) systems and resale obligations of CMRS providers.[1/]

I. INTRODUCTION

Comcast is in agreement with the Commission on the main thrust of this CMRS proceeding: that CMRS providers, in the absence of market power, can be expected to exercise sound business judgment in negotiating interconnection and agreements with other CMRS providers. As a result, the Commission should adopt its tentative conclusion that market forces and individual business judgment of CMRS providers, in lieu of mandated CMRS interconnection, best facilitate efficient interconnection among wireless service providers. In addition, the Commission should monitor the development of roaming on competitive terms, and in particular, to ensure that parties are not manipulating transfer rates for their competitive benefit. Finally, the Commission should adopt its tentative conclusion

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1/ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Notice of Proposed Rulemaking, CC Docket No. 94-54 (released April 20, 1995) (hereinafter the "*Notice*").

that CMRS providers not be required to disaggregate their services to satisfy requests of switch-based "resellers."

II. THE COMMISSION'S PROGRESSIVE APPROACH TO INTERCONNECTION MAY BE UNAVAILING IF LEC INTERCONNECTION POLICIES DO NOT RECEIVE EQUAL OR GREATER ATTENTION.

LEC-to-CMRS interconnection policies that recognize the market power of LECs are pivotal to the competitive availability of a nationwide seamless CMRS network. As Comcast Corporation demonstrated in its comments to the *CMRS Equal Access and Interconnection Notice*,[2/] LEC-to-CMRS interconnection obligations should be designed to promote competition between and among wireless and landline services. Rather than merely reiterating a requirement that LEC rates and CMRS rates be mutually reciprocal for compensation of costs of terminating each other's traffic, the Commission should adopt the model proposed by Comcast Corporation in its comments to the *CMRS Equal Access and Interconnection Notice* for ensuring competition in that reciprocal relationship.[3/] Under the "sender-keep-all" approach,[4/] LECs and CMRS providers would not charge each other for terminating one another's traffic. As a result, both LECs and CMRS providers would have an incentive to become more efficient and to reduce costs, as well as maximize their outgoing

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2/ Comments of Comcast Corporation filed in *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408 (1994) ("*CMRS Equal Access and Interconnection Notice*").

3/ *See*, Comments of Comcast Corporation, at 2-15.

4/ *See* Dr. Gerald W. Brock, *Interconnection and Mutual Compensation with Partial Competition*, *in* Comments of Comcast Corporation, Appendix ("Brock Paper").

traffic relative to their incoming traffic. Moreover, the "sender keep all" model reduces the opportunity for monopoly abuse by LECs who are now only obligated to make available the same interconnection rates to CMRS competitors that they charge their CMRS affiliates. As the Commission correctly recognizes in the *Notice*, LEC investment in CMRS is a significant factor in finding "anticompetitive animus" behind denial of an interconnection requests.[5/] Finally, "sender keep all" more closely approximates LEC cost of interconnection, and encourages competitve development without enmeshing the Commission in cost proceedings.[6/]

The Commission's proposed mutual compensation model of LEC-to-CMRS interconnection is unsuitable without this modification because it does not prevent abuse of monopoly power. Instead, the mutual compensation model is designed to compensate parties for mutually beneficial interconnection of a joint service.[7/] However, the mutual compensation model breaks down when applied to interconnection of carriers who have disparate traffic volumes. If a new entrant originates more traffic on the network of a monopolist then vice versa mutual, compensation does not limit a monopolist's ability to extract profit from its interconnecting competitor.[8/]

5/ *Notice*, at ¶ 43.

6/ *See* Brock Paper filed on behalf of Cox in CC Docket No. 94-54.

7/ *See* Comments of Comcast Corporation, at 11-14.

8/ As noted in the Comments of Comcast Corporation, a 1984 Office of Plans and Policy ("OPP") Working Paper concluded:

> This paper raises serious questions about the wisdom of deregulating U.S. international telecommunications without

(continued...)

As a basis for its tentative conclusion that market forces, rather than regulation, should govern CMRS-to-CMRS interconnection, the Commission tentatively concluded that "[w]ith interconnection available through the LEC . . . , no CMRS carrier can limit the service that another can offer."[9/] The mere "availability" of interconnection from a LEC, however, without further rules based upon a "sender keep all" model of LEC-to-CMRS interconnection, does not provide a sufficient basis for concluding that full interconnectivity will flourish in wireless markets. Comcast suggests that the Commission focus its attention in this proceeding on adoption of rules to ensure that LECs will no longer be able to manipulate LEC-to-CMRS interconnection requirements to serve their monopolies at the expense of indepent CMRS providers.

8/ (...continued)

> considering whether this will increase the market power of foreign telecommunications authorities. Increased competition among U.S. suppliers of international telecommunications services is likely to result in a reduction in the U.S.'s share of the benefits from such services unless the U.S. government takes appropriate countermeasures . . . . When net traffic flow is out of the U.S., as with international MTS, . . . U.S. carriers are making net payments to the PTT. The PTT can extract the same total revenue from U.S. carriers regardless of the terms for dividing the accounting rate by demanding a sufficiently high accounting rate.

See Comments of Comcast Corporation, at nn.12-13 (citing Evan Kwerel, *Promoting Competition Piecemeal in International Telecommunications*, OPP Working Paper 13, at 26, 49 (December 1984)).

9/ *Notice*, at ¶ 31.

III. MARKET FORCES AND INDIVIDUAL BUSINESS JUDGMENT OF CMRS PROVIDERS BEST FACILITATE EFFICIENT INTERCONNECTION IN WIRELESS MARKETS.

The Commission tentatively concluded in the *Notice* that it would be premature to impose a general interstate interconnection obligation upon CMRS providers.[10/] The Commission based this tentative conclusion on the rapidly changing CMRS industry, the current availability of interconnection with other networks via the LEC landline network, and the absence of any CMRS provider (other than LEC affiliates) that could effectively exercise market power to limit the service that another CMRS provider can offer.[11/] The Commission should adopt its tentative conclusion not to impose a general interstate interconnection obligation upon CMRS providers.

A. CMRS Providers Lack Market Power Sufficient To Impose a Interconnection Obligation Upon Them.

The *Notice* invites comment on how to define the product and geographic markets relevant to a decision regarding CMRS-to-CMRS interconnection.[12/] For purposes of interconnection analysis, Commission should employ landline and wireless local exchange service as the relevant product markets and a flexibly defined local service area as the relevant geographic market. Since CMRS providers lack market power in both the landline and wireless local exchange markets and are competitive, the Commission should adopt its

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10/ *See Notice*, at ¶¶ 29-31.

11/ *See id.*

12/ *Notice*, at ¶¶ 33-36.

tentative conclusion that no general interstate interconnection obligation need be imposed upon CMRS providers.[13/]

The *Notice* proposes three possible product market definitions: (i) local exchange services, both landline and wireless; (ii) all commercial mobile radio services; and (iii) mobile voice services.[14/] In the past, the Commission has defined the relevant product market by analyzing the degree to which products or services are "reasonably interchangeable by consumers for the same purposes."[15/] The extent to which products or services are "reasonably interchangeable" depends on the cross-elasticities of demand and supply for such services.[16/]

13/ *See Notice*, at ¶¶ 36-7.

14/ *Notice*, at ¶ 33.

15/ *See Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services; Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band; Amendment of Parts 2 and 90 of the Commission's Rules To Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool*, Third Report and Order, 9 FCC Rcd 7988, 8015 (1994) (hereinafter "*CMRS Third Report and Order*") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("*Brown Shoe*")); *See also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442, 7463 (1994) ("*1994 Cable Competition Report*") (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394 (1956) ("*Cellophane Case*")); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 95-61, FCC 95-186, at ¶ 18 (released May 24, 1995).

16/ *See Brown Shoe*, 370 U.S. at 325; *see also Cellophane Case*, 351 U.S. at 395-404; *Revisions to Price Cap Rules for AT&T Corp.*, Report and Order, CC Docket No. 93-197, 76 Rad. Reg. 2d (P&F) 1375, 1379-81 (1995) ("*AT&T Price Caps Order*") (examines demand and supply responsiveness of commercial long distance business services to conclude that AT&T's commercial long distance services face sufficient competition to justify removal from price cap regulation); *Price Cap Performance Review for Local Exchange Carriers*,

(continued...)

Customers seeking interconnection to landline and wireless local exchange services are demand and supply responsive. Federal and state policies increasingly seek to encourage interconnection to the local exchange by means of facilities-based Personal Communications Services ("PCS") and cellular service providers. Potential competition from PCS, Enhanced Specialized Mobile Radio ("ESMR") and cellular providers justifies a finding that wireless exchange markets are demand elastic.[17/] Increasing competition in the landline local exchange from competitive access providers ("CAPs") demonstrates that the landline and wireless local exchange markets are demand elastic.[18/] Therefore, defining the relevant product market as both landline and wireless exchange service for purposes of this analysis is warranted.

Landline and wireless local exchange markets are also supply elastic. LECs, cellular providers, and PCS providers are positioned to provide interconnected service to

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16/ (...continued)
First Report and Order, CC Docket No. 94-1, FCC 95-132 at ¶ 407 (released April 7, 1995).

17/ The Commission concluded in the *CMRS Third Report and Order* that the strong potential for further competition in CMRS markets from PCS, ESMR, and cellular providers is relevant to a finding that these services are in the same product market. *See* 9 FCC Rcd at 8027-35, nn.122-24 (citing *United States v. Continental Can*, 378 U.S. 441, 455 (1964); Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (April 2, 1993), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104, at ¶¶ 20,573-574 (April 7, 1992)).

18/ In spite of current LEC presence in local markets, Commission staff studies have found that "the seeds of local competition are widespread. Competitive Access Providers (CAPs) have built systems in each of the nation's 20 largest metropolitan markets. Cellular and PCS providers also represent important potential competitors." *See* Federal Communications Commission, Common Carrier Bureau, *Common Carrier Competition*, at 5 (Spring 1995) ("*Common Carrier Competition Report*").

customers.[19/] As the *Notice* recognizes, "CMRS end users can currently interconnect with users of any other network through the LEC landline network."[20/] The huge investment by the winning bidders in the PCS broadband auctions assures that PCS providers "will deploy the facilities necessary to become operational as quickly as possible"; they may also have a "substantial and pervasive" impact upon the local exchange market.[21/]

The relevant geographic market is the local exchange area. The Commission has treated terrestrial mobile communications as local in nature.[22/] The Commission has proposed a flexible approach to the relevant geographic market that reflects traditional service areas of landline local exchange areas and service areas of wireless carriers, such as the Rand

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19/ The Commission has concluded, for example, that investment by cellular carriers of their profits in increased plant and equipment demonstrates their ability to "expand capacity and increase service availability to the public," and cellular investment "has important long-term competitive implications" to enable cellular carriers to compete with PCS entrants. *See Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain Regulatory Authority over Intrastate Cellular Service Rates*, Report and Order, PR Docket No. 94-105, at ¶¶ 139-40 (released May 19, 1995) ("*California Rate Regulation Order*").

20/ *Notice*, at ¶¶ 30-31.

21/ *See California Rate Regulation Order*, at ¶¶ 32-3; *see also Petition of New York State Public Service Commission to Extend Rate Regulation*, Report and Order, PR Docket No. 94-108, at ¶¶ 32-3 (released May 19, 1995).

22/ For example, the Commission has held that radio common carriers, including cellular services, "provide 'exchange service' under Sections 2(b) and 221(b) of the Communications Act, and . . . mobile radio services provided by RCCs and telephone companies [are] local in nature." *See MTS/WATS Market Structure, Phase I*, Memorandum Opinion and Order, 97 F.C.C.2d 834, 882 (1984) (citing *FCC Policy Regarding Filing Tariffs for Mobile Services*, 53 F.C.C.2d 579 (1975); *Public Notice: FCC Announces New Policy Regarding Filing of Mobile Tariffs*, 1 F.C.C.2d 830 (1965); *An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C.2d 469, 483-84 (1981) ("*Cellular Communications Systems*")).

McNally Major Trading Areas (MTAs) and Basic Trading Areas (BTAs) applicable to PCS providers and the Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs) applicable to cellular service providers.[23/]

Assuming that landline and wireless local exchange service markets are the relevant product markets and that the relevant geographic market is flexibly defined as the local service area, the Commission must conclude that CMRS providers lack market power. Consequently, the Commission should adopt its tentative conclusion that imposition of a general interstate interconnection obligation upon CMRS providers is unwarranted.[24/] In the landline and wireless local exchange markets, only landline LECs and their CMRS affiliates exercise market power[25/] to control prices or exclude competition sufficient to justify imposition of an interconnection obligation upon them.[26/] CMRS providers face substantial actual and emerging competition from multiple competitors in the same local exchange market, including landline LECs, wireline and non-wireline cellular carriers, ESMRs, and common carrier and private carrier paging providers.[27/] The Commission has recognized that CMRS providers face competition in the same local exchange markets sufficient to ensure

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23/ *See CMRS Equal Access and Interconnection Notice*, 9 FCC Rcd at 5438-39.

24/ *See Notice*, at ¶ 41.

25/ Market power is the "power to control prices or exclude competition." *See Cellophane Case*, 351 U.S. at 391.

26/ *See Notice*, at ¶ 41 (states that "[p]ast interconnection decisions have primarily been addressed to local exchange carriers with significant market power"). The *Common Carrier Competition Report* indicates that, in 1994, LECs "continue to account for 97% of access revenues -- a level roughly comparable to the Bell System's share of toll revenues in 1981." *Id.* at 5.

27/ *See CMRS Third Report and Order*, 9 FCC Rcd at 8017-20.

just and reasonable intrastate rates, in lieu of rate regulation.[28/] In addition, pending legislation in Congress exempts CMRS providers from an interconnection obligation, unless their service is a "replacement for a substantial portion of the wireline telephone exchange system" within a State.[29/] Accordingly, because CMRS providers do not have market power in the landline and wireless local exchange market, no general interstate interconnection obligation should be imposed upon them.

B. If the Commission Does Not Impose a General Duty Upon CMRS Providers to Interconnect, the Business Judgment Rule Should Govern CMRS-to-CMRS Interconnection.

The Commission tentatively concludes that "the decision of interconnection 'where warranted' is best left to the business judgment of the [CMRS] carriers themselves."[30/] Absent a Section 201(a) hearing and public interest determination, precedent requires that the business judgment rule apply to decisions by CMRS providers voluntarily to provide or refuse physical interconnection requests because CMRS providers do not otherwise have a duty to interconnect under the Act.

Sections 332(c)(1)(B) and Section 201(a) of the Act contain the physical interconnection requirements of the Act. Section 332(c)(1)(B) provides that

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28/ *See* note 21 *supra*.

29/ *See, e.g.*, H.R. 1555, 104th Cong., 1st Sess. 153 (Comm. Print May 20, 1995) ("House Bill") (exempts CMRS providers from definition of "local exchange carrier" to which interconnection and equal access duties apply, unless the CMRS service "is a replacement for a substantial portion of the wireline telephone exchange service within" a state); *Cf.* S. 652, 104th Cong., 1st Sess. 14-15 (March 30, 1995) ("Senate Bill") (imposes interconnection duty upon all LECs with market power).

30/ *See Notice*, at ¶ 37.

> [u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service *pursuant to the provisions of section 201 of the Act.* Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to the Act.[31/]

The plain language of Section 332(c)(1)(B) bases the Commission's authority to order a common carrier to interconnect upon Section 201 of the Act.

The first clause of Section 201(a) imposes a "duty [upon] every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request . . . ."[32/] The second clause of Section 201(a) requires common carriers, "[i]n accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers . . . ."[33/] The plain language of the Section 201(a) shows that, while common carriers have an unconditional duty to provide "service" upon reasonable request under the first clause of the statute, the duty of a common carrier to "establish physical connections" does not arise until issuance of "orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest."[34/]

31/ 47 U.S.C. § 332(c)(1)(B) (1993) (emphasis added).

32/ *See* 47 U.S.C. § 201(a).

33/ *See id.*

34/ Of course, to the extent that the first clause of Section 201(a) imposes a duty upon a common carrier to provide "service" on a nondiscriminatory basis under Section 202(a),

(continued...)

Section 201(a) cases also demonstrate that, absent a Section 201(a) hearing and public interest determination, the business judgment rule governs voluntary interconnection decisions. In *Satellite Business Systems*, the Commission held that Section 201(a) *does not* impose an interconnection duty upon a common carrier, absent a hearing and public interest determination. The Commission stated that, when Section 201(a) was enacted, "there was no common law duty for carriers to interconnect."[35/] The Commission noted that legislative history "demonstrates that the Interstate Commerce Act also imposed no duty to interconnect in the absence of Commission order."[36/] That being so, the Commission concluded:

> Under Section 201, it is possible for carriers *either to interconnect their facilities voluntarily, without Commission permission or order, or to interconnect pursuant to order of the Commission based upon a public interest finding.* Insofar as the Act and Section 201 are concerned, *a carrier may choose not to interconnect, as a matter of business judgment, unless the Commission has directed otherwise* [37/]

34/ (...continued)
without a prior Commission hearing and public interest determination, a CMRS provider automatically assumes a duty to provide "service," as opposed to physical interconnection, by virtue of its regulatory status as a common carrier. Thus, to the extent that a CMRS provider offers a "service," such as roaming, it has an immediate duty as a common carrier, to provide service and make it available on nondiscriminatory basis. *See* discussion at Section IV *infra*.

35/ *See United States v. AT&T*, Memorandum of Federal Communications Commission as Amicus Curiae, Civ. No. 74-1698 (D.D.C. 1975) *reprinted in Satellite Business Systems*, 62 F.C.C.2d 997, 1103, 1112 n.15 (1977).

36/ *See id.* (citing *Hearings Before the Committee on Interstate and Foreign Commerce*, H.R. 83-1, 73d Cong., 2d Sess. 14, 19 (1934); *Atchison, Topeka & Santa Fe R.R. v. Denver & N.O.R.R.*, 110 U.S. 667, 680 (1884); *Oklahoma-Arkansas Tel. co. v. Southwestern Bell Tel. Co.*, 45 F.2d 995 (8th Cir. 1930), *cert. denied*, 283 U.S. 822 (1931)).

37/ *See Satellite Business Systems*, 62 F.C.C.2d at 1112-13 (emphasis added).

The Commission's interpretation in *Satellite Business Systems* demonstrates that Section 201(a) imposes no affirmative duty upon carriers to interconnect, absent a hearing and public interest determination.

Case law supports the Commission's interpretation of Section 201(a) in *Satellite Business Systems*. In *Southern Pacific*, the Court rejected a private monopolization action filed by a specialized common carrier against AT&T, which included claims that AT&T had wrongfully denied interconnection to its intercity and private line transmission facilities.[38/] In denying the interconnection claims, the Court held:

> Section 201(a) imposes a duty on carriers to provide interconnection to other carriers only "where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest." *Prior to an opportunity for hearing and a Commission determination under Section 201(a) that a requested interconnection would be in the public interest , . . . a carrier has no duty under the Communications Act to provide interconnection to another carrier.*[39/]

The Court concluded that Section 201(a) requires the carrier from whom interconnection is sought to decide on its own, in the first instance, whether the interconnection requested is warranted based on its own business judgment, and may decide to refuse interconnection based on a legitimate exercise of its business judgment.

Absent a prior hearing and public interest finding in this proceeding, the Commission cannot impose a general interstate interconnection obligation upon CMRS

38/ *See Southern Pac. Communications Co. v. AT&T*, 556 F. Supp. 825 (D.D.C. 1983) (*Southern Pacific*), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985).

39/ *See Southern Pacific*, 556 F. Supp. at 975 (citation omitted) (emphasis added).

providers. Section 201(a) provides that CMRS providers are free to negotiate and approve or deny interconnection requests based on their own business judgment. The Commission should accept this result knowing that carriers without market power have no incentive to avoid efficient interconnection. Once CMRS intercarrier *traffic* levels rise, direct interconnection will also rise.

C. Applying the Business Judgment Rule to CMRS-to-CMRS Interconnection Arrangements Advances Public Policy Goals.

An analysis of market power alone is not sufficient to determine whether a general interconnection obligation should be imposed upon CMRS providers, as the Commission must also determine whether imposition of an interconnection duty will advance its public policy goals.[40/] Allowing CMRS providers to negotiate interconnection arrangements based on market forces and their own business judgment, rather than by regulatory mandate, will further enhance access to all CMRS networks, CMRS network reliability, flexibility and efficiency, and creation of a "ubiquitous 'network of networks'."[41/]

In a still-evolving CMRS marketplace with a wide variety of broadband and narrowband service providers, some of which are not operational, affording CMRS providers the flexibility to negotiate interconnection arrangements based on their own business judgment would best facilitate the Commission's goal of establishing a nationwide seamless, wireless

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40/ *Notice*, at ¶ 41.

41/ *See Notice*, at ¶ 28 n.62 (citing H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261 (1993) ("The Committee considers the right to interconnect an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless network.").

network.[42/] Where no CMRS provider has market power, unlike LEC landline telephone providers, the public interest would best be served by allowing a CMRS provider's business judgment decide individualized interconnection arrangements.

Imposing a general interstate interconnection obligation upon CMRS providers, absent market power, would impose undue burdens and exact infrastructure costs that outweigh any benefits that would result from such a mandate.[43/] A mandatory CMRS-to-CMRS interconnection would impose massive costs upon CMRS providers by requiring them to dismantle their networks and lose significant investment in plant, equipment and increased spectrum capacity.[44/] Because CMRS providers are already subject to competitive pressures to interconnect, imposing a mandatory physical interconnection requirement upon CMRS providers would not result in any benefits that marketplace forces do not already guarantee. A mandatory CMRS interconnection obligation is. accordingly, not in the public interest.

42/ *See, e.g.*, Commissioner Rachelle B. Chong, A Woman's Perspective on Convergence in Communications, Remarks to the American Women in Radio and Television, 44th National Convention, at 2-3 (June 2, 1995) ("Let me also be clear that government is not going to build the Information Superhighway. We believe our role is to be referees and cheerleaders who are encouraging the private sector to build the networks and ensure their interoperability and access to all."); *see also* House Bill, at 16-17 (requirement that LECs file statement of terms and conditions of interconnection sunsets in markets where the Commission finds "full and open competition").

43/ While pending legislation includes physical interconnection requirements, these provisions would apply only to LECs with market power under the Senate Bill, or only to a CMRS provider if its service was a replacement for a "substantial portion" of the wireline telephone exchange service in a State. *See* House Bill, at 153; Senate Bill, at 14-15. Today, CMRS providers neither have market power, nor do their services, while competitive, constitute a replacement for the wireline telephone exchange. *See, e.g.*, MFS Communications Company, Inc., Unbundling of Local Exchange Carrier Common Line Facilities, Petition for Rulemaking, RM-8614, at 6-7 (filed March 17, 1995).

44/ *See CMRS Third Report and Order*, 9 FCC Rcd at 8017-20.

D. An Interconnection Duty Cannot Be Imposed Upon CMRS Providers by Means of Resolution of Section 208 Complaints.

In purporting to establish certain "policy guidelines," the *Notice* states that CMRS providers are subject to formal complaints filed by other CMRS providers seeking interconnection under Section 201(a).[45/] Taken literally, the "policy guidelines" enunciated in the *Notice* grossly violate the substantive due process rights of all CMRS providers subjected to such formal complaint proceedings. Furthermore, subjecting CMRS providers to the Commissions's full enforcement powers under Section 208 during the pendency of the instant rulemaking is arbitrary and capricious and in contravention of the law.[46/]

Section 201(a) authorizes the Commission to order physical interconnection only after conducting a hearing and making a finding that ordering interconnection is in the public interest.[47/] The "hearing" procedure the Commission has consistently employed to order physical interconnection is notice-and-comment rulemaking procedure.[48/] Yet, the *Notice* suggests that the "steps the Commission may take to enforce statutory rights and obligations set forth in Section 201(a)" regarding CMRS-to-CMRS interconnection include: (i) notice and comment rulemaking; (ii) resolution of individual complaints pursuant to Section 208; and (iii) initiation of "other proceedings."[49/]

45/ *Notice*, at ¶¶ 38-40.

46/ *See* 5 U.S.C. §§ 556, 706 (2)(A) (reviewing court to determine whether agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law).

47/ *See* 47 U.S.C. § 201(a).

48/ *See* notes 50-52 *infra*.

49/ *See Notice*, at ¶¶ 40, 43.

While it is true that a regulatory agency has discretion to proceed by rulemaking or adjudication in formulating general policy,[50/] once an agency determines that rulemaking procedure is the proper procedure for resolving general issues of broad application it is both arbitrary and capricious for an agency to switch to adjudication for only select parties.[51/] In determining whether to allow new entry by specialized common carriers into private line services, the Commission proceeded by rulemaking instead of adjudication, stating that "a basic change in policy[] 'is better and more fairly examined and considered in rulemaking proceedings, where the inquiry can be thorough and where all interested parties can participate.'"[52/] The Commission held that it would not consider policy questions involving "matters of overall industry consequence" in individual adjudicatory proceedings because:

> [there is] no interest of the public to be served by holding a multiplicity of proceedings to consider the same contentions over and over again, or by a piecemeal, regional evaluation of policy

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50/ *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

51/ *See, e.g., United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994) (finding that the Commission's implementation of base penalty schedule for forfeitures was not a policy statement, and should have been put out for notice and comment); *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 745-46 (D.C. Cir. 1986) (failure to explain why Commission would retroactively apply new policy of forbearing from franchise-fee disputes was arbitrary and capricious because Commission failed to justify its decision by considering alternatives).

52/ *Establishment of Policies and Procedures for Consideration of Application To Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, First Report and Order, 29 F.C.C.2d 870, 896-97 (1971) ("*Specialized Common Carrier*") (quoting *Hale v. FCC*, 425 F.2d 556, 560 (D.C. Cir. 1970)), *aff'd on recon.* 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

> factors which are essentially nationwide in scope . . . . [T]he delay entailed in such a cumbersome [adjudicatory] procedure would be contrary to the public interest in an early resolution of the need for the systems proposed to be established.[53/]

Without concluding a rulemaking to establish a general interconnection obligation upon CMRS providers, the Commission's decision to subject CMRS providers to formal complaint proceedings involving CMRS-to-CMRS interconnection disputes unjustly deprives CMRS defendants in such proceedings of their due process right to a "hearing," as required by Section 201(a), on whether a general interstate interconnection obligation should be imposed.[54/] To subject CMRS providers to enforcement proceedings for alleged Section 201(a) violations where the *Notice* and the *CMRS Equal Access and Interconnection Notice* have addressed only broad economic issues would deprive CMRS providers of a meaningful opportunity for a hearing and their substantive due process rights under Section 201(a).

53/ *Specialized Common Carrier*, 29 F.C.C.2d at 900.

54/ For example, the Commission held in the *AT&T MTS/WATS Order* that to order AT&T to provide physical interconnection to MTS and WATS for specialized common carriers, where the scope of physical interconnection required in past orders applied only to private line offerings of specialized common carriers, would deprive AT&T and other telephone companies subject to such an order "of a meaningful opportunity for a hearing with respect to the public interest consequences not only of such competition but also of such interconnection." *See American Tel. & Tel. Co., The Associated Bell System Companies; Charges for Interstate Telephone Service*, Memorandum Opinion and Order, 67 F.C.C.2d 1429, 1475-6 (1978) ("*AT&T MTS/WATS Order*"). The Commission concluded that ordering existing telephone companies to provide physical interconnection to MTS and WATS without a prior hearing would "violate [existing telephone companies'] rights under Section 201(a)." *See id.* The *AT&T MTS/WATS Order* further notes that, where prior specialized common carrier proceedings had addressed only broad economic issues regarding competition, "to hold that such broad economic inquiries have provided the telephone industry the 'opportunity' for hearing . . . would be a clear abuse of due process." 67 F.C.C.2d at 1476 n.8.

The Commission cannot satisfy the "hearing" requirement under Section 201(a) to impose an interconnection obligation upon CMRS providers by means of a formal complaint proceeding under Section 208 because it has already determined that the "hearing" required under Section 201(a) to impose a general interconnection obligation is a rulemaking proceeding.[55/] In the past, the Commission has proceeded by rulemaking -- rather than "piecemeal" adjudications -- to give all potentially affected carriers and parties notice and an opportunity to comment on the legal issue under Section 201(a) whether a general interstate interconnection obligation should be imposed.[56/]

55/ *See Specialized Common Carrier*, at notes 50-51 *supra*.

56/ In the past, the Commission has made a *final determination* that a Section 201(a) interconnection obligation as a general rule would be imposed upon a monopoly carrier, prior to subjecting such carriers to potential liability in formal complaint proceedings. *See, e.g., MTS and WATS Market Structure*, Notice of Proposed Rulemaking, CC Docket No. 78-72, Phase III, 94 F.C.C.2d 292, 296-7 (1983); *MTS and WATS Market Structure*, Report and Order, CC Docket No. 78-72, Phase III, 100 F.C.C.2d 860 (1985); *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. U.S.*, 460 U.S. 1001 (1983) (*MFJ*). In *Indianapolis Tel. Co. v. Indiana Bell, et al.*, Memorandum Opinion and Order, 1 FCC Rcd 228 (Com Car. Bur. 1986), *aff'd on review* 2 FCC Rcd 2893 (1987), the Commission relied on prior rulemakings to resolve a formal complaint filed by a nonwireline cellular carrier against the telephone company for violations of interconnection obligations under Section 201(a). *See The Need To Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order, 59 Rad. Reg. 2d (P&F) 1275 (1986); *Cellular Communications Systems*, 86 F.C.C.2d at 495-96. In the expanded interconnection proceeding, the Commission first concluded rulemakings to define the type, nature and scope of collocation requirements it would impose upon LECs to resolve complaints filed by competitive access providers against the LECs' expanded interconnection tariffs. *See Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 91-141, 7 FCC Rcd 7369 (1992) (*Special Access Expanded Interconnection Order*), *recon.*, 8 FCC Rcd 127 (1992), *vacated in part and remanded sub nom. Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

IV. THE COMMISSION SHOULD MONITOR ANTICOMPETITIVE ROAMING PRACTICES.

The *Notice* correctly states that roaming capability is an increasingly important feature of mobile telephony and the development of a "network of networks."[57/] The *Notice* tentatively concludes that the Commission should continue to monitor the implementation of nationwide seamless roaming networks, but need not take any further regulatory actions.[58/] The Commission should adopt a finding in this proceeding that roaming cannot be used as an anticompetitive tool and direct its future monitoring efforts to detection of discriminatory roaming practices.

Since roaming is a service,[59/] the Commission has jurisdiction over violations of its existing roaming requirements. The Commission's rules require cellular carriers to provide service to all cellular subscribers in good standing, including roamers in their "home" service areas.[60/] As common carriers, CMRS providers have a statutory duty under Section 202(a) to make services such as roaming available on a nondiscriminatory basis to all

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57/ *Notice*, at ¶ 54.

58/ *Notice*, at ¶ 56.

59/ If a mobile service meets the statutory definition of CMRS under Section 332(d), then it is subject to Title II common carriage obligations. *See* 47 U.S.C. §§ 332(c)(1)(A), 332(d). *See also Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1439 n.130, 1441 (1994) ("*CMRS Second Report and Order*"); *Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands*, Report and Order, CC Docket No. 92-166, 9 FCC Rcd 5936, 6002-05 n.242 (1994) (individualized or customized offerings are treated as common carriage, if the CMRS definition is met).

60/ See 47 C.F.R. § 22.901 *reprinted in Revisions of Part 22 of the Commission's Rules Governing the Public Mobile Services*, Report and Order, 9 FCC Rcd 6513, 6660 (1994) ("*Part 22 Rewrite*").